

INSTITUTE FOR POLITICS DEMOCRACY & THE INTERNET

www.ipdi.org

June 2, 2005

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Via: Internet@fec.gov

Re: Comments on Notice 2005-10: Internet Communications

Dear Mr. Deutsch:

These comments are submitted in response to the Federal Election Commission's (FEC's) Notice of Proposed Rulemaking 2005-10 published at 70 Fed. Reg. 16967 (April 4, 2005). The Commission seeks comments on how it should amend the rule defining "public communication" in 11 CFR 100.26 to include public communications taking place on the Internet. The Commission also seeks comment on whether to extend the exception for news stories, commentaries and editorials to media activities that appear on the Internet, and whether to extend the protections of certain volunteer activities to individuals' online political activities.

The FEC's proposed rulemaking calls into question issues that were highlighted by online political activities conducted during the last election, including the political communications of bloggers. It also includes questions about Internet-related activities by corporations, unions and wealthy individuals, which were not as evident in the last election, but may play a more prominent role in future elections. In responding to the Commission's request for comments, I wish to make four points:

- The Internet has "democratized democracy," in the memorable phrase of Meetup.com CEO Scott Heiferman, by empowering a broad swath of citizens to actively participate in and contribute to political campaigns quickly, easily and inexpensively.
- The FEC's regulations, many of them over 30 years old, must be updated to accommodate this new political landscape, so that previously unengaged citizen activists do not get caught up in a regulatory net that will chill their free speech and inhibit their political activities.
- At the same time, the FEC must ensure that the prohibitions against the use of corporate and union money in federal elections, recently reaffirmed by the Supreme

Court in *McConnell v. Federal Election Commission*, extend to political communications transmitted over the Internet.

- Finally, the FEC must clarify the circumstances under which bloggers are entitled to the media exemption, mindful that such a status permits the recipients to carve out an almost unlimited exemption from federal campaign finance laws.

In addition, I request the opportunity to testify at the public hearing on June 28 or 29, 2005.

1. The Internet has exerted a profound effect on the landscape of American politics.

Until the 2004 election, federal campaigns, and especially presidential campaigns, tended to be an insiders' game, run by a small clique of big donors, political journalists and professional and semi-professional political operatives. For all practical purposes, these insiders determined the nominees for federal office, including the presidency.¹

In this elite circle of political activity, where upwards of 70 percent of contributions came from big donors, there was little need for anyone outside the campaign and parties to understand the arcane rules governing contributions, in-kind contributions, exemptions to the definition of contribution and the reporting of contributions. The volunteers and campaign supporters who needed the advice of expert campaign finance counsel had free access to their services through the candidates and the party committees they were associated with.

Similarly, virtually the only people making independent expenditures were experienced operatives, the kinds who knew that expenditures in excess of \$250 triggered a reporting obligation to the FEC. The occasional irate citizen who decided to buy a billboard or take out an ad in the local newspaper -- or even a national paper, such as *The New York Times* -- was unusual enough to rate media coverage.

In this pre-Internet political world, average citizens hesitated to volunteer. Having no way to know beforehand if they would fit in, or if the campaign would demand more of their time and resources than they wanted to commit, few took the plunge. The result was that every two, four and six years brought out the same cadre of operatives, a group I would estimate comprised no more than 100,000 to 150,000 people across the country.

The Internet has changed the old paradigms by lowering the barriers to entry. Prospective volunteers can now go to a candidate's Web site and peer in the virtual window of the campaign. They can see pictures, read staff bios, find out which of their neighbors have signed on, and download a neighborhood list for door-to-door grassroots activities.

As a result of this online transparency, ordinary citizens' understandable reluctance to jump in feet first has been replaced by record numbers of volunteers. The Bush campaign, to cite the most successful example, used the Internet to help attract and mobilize 6 million online volunteers—called e-activists—and 1.4 million volunteers on

¹ For a fuller explanation of the process, see Arthur Hadley, *The Invisible Campaign*, 1976.

the ground. The Kerry campaign, when combined with the activities of the 527 groups, can lay claim to similar numbers. Volunteers for other down-ticket races swelled the numbers of active political participants to 13 million, according to the Pew Internet and American Life Project.²

Many of these previously unengaged citizens also made record numbers of small political contributions, many over the Internet. Online donors to John Kerry's campaign contributed an unprecedented \$82 million, most of it in contributions under \$100. According to the Campaign Finance Institute, this represents a four-fold increase in small contributions since 2000.³

In some cases, as often happened in the primary campaign of Howard Dean, these newly-empowered citizens took it upon themselves to establish local campaign organizations with little or no supervision from the national headquarters. Many of these supporters communicated with the campaign, at least via the Internet, and the national campaign Web site contained links to their Web sites. These local groups, therefore, were not wholly independent of the official campaign, but in fact made their own determinations about how, when and if they would spend money for political communications. Many of these groups contained members who also participated in online chat rooms and face-to-face events facilitated by Meetup.com. Others used "social software," such as Friendster, Orkut and LinkedIn, to find and communicate with like-minded citizens. A number of these local groups have remained intact and continue to engage in local political activities.

2. The FEC rules do not easily accommodate these online activities.

Internet-facilitated political activity by ordinary citizens is the new paradigm, one that could not have been contemplated by FEC rules written 30 years ago. Many of these new groups of activists are only loosely connected to candidates, and for the most part operate outside the official political party structure. Many were not active before the last election, and they generally do not have access to expert legal and accounting advice. Their continued political involvement should be encouraged, and their political speech applauded, not chilled. They should not have to hire \$500-an-hour lawyers to avoid being ensnared in a regulatory net that, at least historically, has tended to trap smaller political prey while allowing the powerful to escape its confines.

Prosecutorial Discretion is Insufficient

Various FEC officials have indicated their willingness to exercise prosecutorial discretion in not pursuing inadvertent and minor violations of the Act. In a slightly different but related context, others have said that it is not their intention to become the "blogger police."

² Pew Internet & American Life Project, *The Internet and Campaign 2004*, 2005.

³ Campaign Finance Institute analysis of primary funding, 2004 <http://www.cfinst.org/pr/100404.html>.

However, at a recent legal briefing hosted by the Institute for Politics, Democracy & the Internet (IPDI) and the Center for Democracy & Technology (CDT) for bloggers, political consultants and other members of the online political community,⁴ what aroused the most concern was the discussion among three nationally-recognized legal experts about political committees. Although the three lawyers could not agree on whether certain collective activity by bloggers (or indeed any group of activists) that did not include establishing a joint bank account, but involved expenditures exceeding \$1000, would make them a “political committee,” the three readily agreed that the threshold for pursuing a complaint is so low that the FEC would open an enforcement action, thus subjecting the respondents potentially to civil fines and certainly to the payment of legal fees. In an increasingly partisan political atmosphere, the fear of an opponent filing a politically-inspired complaint is not unrealistic, nor is the fear of incurring substantial legal fees to defend against a protracted FEC investigation.

For this reason, the FEC should set the various thresholds high enough to allow the activities of most local citizens to escape the net of disclosure, disclaimers and reporting. Some of this can be accomplished by the FEC through its rulemaking process; other problematic rules are embedded in the Act itself and must be updated by Congress.

Congress Must Update Some Definitions

The \$250 threshold for reporting “independent expenditures,” for example, is a statutory matter, not a regulatory one, as is the \$1,000 threshold for becoming a “political committee.” Only Congress can increase these limits.

On the other hand, the FEC can and should add new exemptions to the definitions of “contribution” and “expenditure,” as it has signaled its willingness to do in the current rulemaking. These should include a volunteer’s use of computers, hardware and software, servers and broadband (and similar) connections. The FEC should also consider allowing employees of corporations and unions who are allowed to take their laptop computers home and use them for personal correspondence and research, to use them for more than one hour a week or four hours a month for political activities. The current limitation is simply not realistic in today’s political environment.

The FEC Must Balance Exemptions with Disclosure

The flip side of exemptions, of course, is lack of disclosure. The FEC must balance the public’s right to know who is funding political activities and communications against the burden imposed on ordinary citizens to learn the law and regulations, to register with the FEC, and to file periodic reports.

3. The Internet must not become the new frontier for prohibited contributions by corporations, unions and wealthy individuals.

⁴ Will the Revolution be Regulated?: What You Need to Know to Respond Effectively to FEC’s Proposed Internet Rulemaking, 11 May 2005, <http://www.ipdi.org/fec/>.

In the last presidential election, unions and wealthy individuals, and to a lesser extent, corporations, spent record amounts of money, largely through the so-called 527 committees, to advocate the election or defeat of one or the other of the presidential nominees. Most of this money was spent on grassroots activities or television advertising. Little was spent on Internet communications, especially online advertising, even though the Internet exemption to the definition of “public communications” that exists in the current regulations would have allowed otherwise prohibited contributions to be spent in unlimited amounts.

The Paucity of Online Advertising in 2004 Is Unlikely to be Repeated

The paucity of expenditures for online advertising has led some to argue that if it isn’t broken don’t fix it. However, most of the reasons for the lack of popularity of online advertising that existed in 2004 will disappear in 2006 and beyond; and an Internet exemption that, for the most part, was unused in the last election will not remain unexploited for long, as the 30 year history of campaign finance regulation so clearly demonstrates.

The lack of popularity of online advertising surprised even online advertising experts, especially given that the 2004 election was touted as “the year of the Internet.” Nonetheless, less than 1% (only 0.9%) of all political advertising occurred on the Internet.⁵

Chief among the reasons for the lack of popularity of online political advertising in 2004 were these: the lack of experience among political consultants in purchasing online advertising; consultants’ belief that online audiences had already made up their minds and that they were therefore preaching to the choir; and consultants’ skepticism the Internet is a persuasive medium.⁶

By the 2006 election, and surely by the 2008 election, these impediments to purchasing online advertising will fade as surely as political consultants will become more knowledgeable in buying the ads. By 2008, 56.9 million American homes will have broadband (as opposed to 32.5 million in the 2004 election),⁷ and the currently popular billboard-style Internet ads will give way to “rich media” ads (i.e., those with sound and moving images) that pack an emotional punch similar to that found in television advertising. Moreover, the Internet remains the best medium to reach people at work, and the Internet and television will converge.

In addition, political advertisers are also beginning to appreciate the quality of the online political audience, which comprises an influential group of civic and political activists,

⁵ “Political Advertising 2004,” TNS Media Intelligence/Cmag, presented at the E-Voter Institute Fourth Annual Survey of Political and Advocacy Communication Leaders, November 30, 2004.

⁶ Mark Glaser, “Candidates Slow to Bring Political Advertising Dollars to the Web,” Online Journalism Review, 9 February 2004. Glaser pointed to the reluctance of veteran political consultant Ray Strother who stated, “I am pro-Web and would love to put my candidates on it. But I can’t gamble their lives on it.”

⁷ Telecommunications Industry Association, 11 April 2005.

whose opinion is sought out by their friends, neighbors and colleagues. A landmark study conducted by the Institute in February 2004 demonstrated that 69% of individuals who participated in online political activities were the type of opinion leaders that Ed Keller and Jon Berry describe as “Influentials” in their eponymous book.

For these reasons, the Internet represents an increasingly attractive medium, not just for candidates and political committees, but also for corporations, unions and others who wish to influence the outcome of elections. This represents both an opportunity and a source of concern: an opportunity for sellers of online advertising and for candidates, parties and interest groups who wish to reach key segments of the population quickly and inexpensively, and a source of concern to reformers who fear that the Internet offers a new frontier for prohibited contributions by corporations, unions, and wealthy individuals.

These prohibited sources can use the Internet in a number of ways in addition to online advertising. For example, corporations and unions can make “soft money” contributions to one or more state parties in states with permissive regulations governing such contributions. Given that the Internet does not take geographic boundaries into account, these state party committees can assume the role previously played by national party committees, creating expensive digital content, such as TV-quality videos, to be distributed nationally over the Internet by email, or by allowing it to be downloaded by others who can then use it in a variety of ways. It goes without saying that just because transmission on the Internet is virtually free, does not mean that all communications transmitted over the Internet are without cost. The price of creating sophisticated digital content can be significant.

The last election witnessed the beginning of a new genre of political communications, inflammatory political videos that raced around the Internet, emailed from friend to friend and linked to on popular blogs. Generally, the most incendiary videos were created by individuals unconnected to candidates or political parties. However, the specter of state party committees’ commissioning scores of individualized videos (dealing with, for example, abortion or other hot button issues), then micro-targeting them to supporters by means of detailed lists currently being developed by the two national party committees is a frightening one, made all the more troubling by the potential funding of such polarizing political operations by corporations, unions and wealthy individuals.

Thus, keeping corporate and union money off the Internet is not so much about prohibiting the posting of an endorsement for a candidate on their own (obscure) websites, as some proponents dismissively suggest, as it is about preventing the Internet from being used to evade the limitations and prohibitions set forth in the Bipartisan Campaign Reform Act.

4. Should bloggers be given the media exemption?

Just as national politics was once an insiders’ game, news coverage of national politics and serious political commentary were once the exclusive domain of media elites. Not

any more. Bloggers have “democratized” journalism, and a coalition of bloggers has demanded the same wholesale exemption from the federal campaign finance laws that is currently provided to so-called mainstream media.

That exemption allows traditional journalists to fully communicate and coordinate with candidates, online or offline, and then spend, through their corporate employers, unlimited amounts of money publishing whatever news or commentary they please, favorable or unfavorable, fair or unfair, in any distribution channel: TV, radio, newspapers, magazines or the Internet.

The bloggers are correct about the broad scope of this exemption: the news media can interview candidates, get leaked stories from them about their opponents, hold editorial board meetings with them, endorse them and even follow them around all day long if they are so inclined, none of which is subject to regulation by the FEC, regardless of how much money they spend.

On its face, the bloggers’ request for rights equal to those of mainstream media seems reasonable. Their online readership, in a few instances, exceeds those of mid-sized daily newspapers, and their influence and legitimacy continues to grow, in some cases exponentially. Last summer, dozens of bloggers were issued press credentials at the two national party conventions, and several of them have been credentialed by the House and Senate Press Galleries. Recently a blogger was given a day pass to the White House Press Room.

Some bloggers want it both ways, however. They want to preserve their rights as political activists, donors and even fundraisers -- activities regulated by campaign finance laws -- yet at the same time enjoy the broad exemption from the campaign finance laws afforded to traditional journalists. As one blogger speculated, “So basically, I can do whatever I want, spending however much money I want (blogTV that has fatband maximized by megamillions) and just call it a blog?”⁸ That is exactly right.

For thirty years the campaign finance laws have made a fundamental distinction between political activists and the news media, in order to protect a free press while at the same time limiting the influence of big money on federal elections. Until recently, the distinction between the news media and rest of us was clear and uncontroversial.

Bloggers blur that distinction. If anyone can publish a blog, and if bloggers are treated as journalists, then we can all become journalists. If millions of “citizen journalists,” as bloggers like to call themselves, are given the rights and privileges of the news media, two consequences will follow.

One is that a newly-expanded media exemption encompassing millions of bloggers will create a new loophole that will eviscerate the contribution and expenditure limits of the campaign finance law.

⁸ Jerome Armstrong, MyDD.com, 4 March 2005. <http://www.mydd.com/story/2005/3/4/17648/96307>.

The other consequence is that the privileged status the press currently enjoys will diminish. When that happens, an erosion of its most important privilege, its ability through shield laws to protect the anonymity of its sources, will surely follow. While the FEC has no jurisdiction over shield laws, a change in the rules defining the news media in one arena is bound to affect other laws. As the pool of those considered journalists quickly expands, it is inevitable that the media's fragile privilege to refuse to answer questions about sources posed by prosecutors and grand juries will narrow.

The ramifications of the bloggers' demand are enormous. The issue before the FEC goes to the heart of the fundamental questions that define a democracy's relationship to a free press: Who should be treated as a journalist, and what special privileges, if any, should they receive?

The question is urgent and the implications are profound. One by-product may be the destruction of the regulatory scheme for limiting federal campaign contributions that has been in place since the mid-1970s.

If the statute is to survive, two principles must emerge. First, the class of bloggers entitled to be treated as "news media" -- and thus exempt from most campaign finance laws -- must be limited. Secondly, the FEC must make clear that bloggers cannot wear two hats simultaneously: that of journalist and that of partisan activist. Just as previous generations of offline activists at various stages in their careers assumed different roles -- those of activist, journalist, even officeholder -- bloggers must realize that they cannot avail themselves to the rights and privileges of journalists in any election in which they choose to participate as a partisan activist. This principle applies with even more force in situations where a blogger becomes, in effect, a paid political operative by accepting money from a candidate or political committee for advice or other consulting work.

Bloggers can have it all, but not all at one time, without destroying the two campaign finance statutes or the press exemptions or both. Given the social and political changes ushered in by new communications technologies, it may already be too late for anything but a massive overhaul of the campaign finance statutes.

The issue may be beyond the regulatory authority of the FEC, and the Commissioners may have to let Congress sort out this issue. If, on the other hand, the FEC believes it has the will and the authority to parse the difficult distinctions between bloggers who are journalists and those who are not, it should establish clear guidelines, so very few individual bloggers will have to incur the expense of having to file a request for an advisory opinion. At a minimum, the FEC must insist that anyone who avails him or herself of the media exception should not operate as a political activist (including raising money) in the same election.

Should Bloggers be Required to Disclose Payments from Candidates and Parties?

The 30-year history of the current statutory scheme for regulating campaign finance is replete with examples of campaigns making payments to ministers and influential

community leaders in exchange for their support. In the past these payments were sometimes disguised as payments to church building funds or for Election Day expenses, such as hiring cars or printing sample ballots and palm cards. Needless to say, payments to these individuals were often far in excess of the cost of the printing or the renting of cars and the payments to drivers. The FEC has never imposed on other influential community leaders a requirement to disclose payments that would otherwise be reported, generally within a month's time, on documents filed by the candidates and party committees. As a matter of law, it should not impose such obligations on bloggers.

However, as a matter of ethics, such payments should be disclosed at the time the payments are received by all political and community leaders -- including ministers, and including bloggers. Of course, bloggers who wish to be treated as journalists should decline such payments altogether.

Summary

In summary, the "democratization of democracy" that the Internet has wrought has profoundly changed the nature of political participation in American politics. The FEC's regulations, many of them over 30 years old, must be updated to accommodate this new political landscape. At the same time, the FEC must ensure that this changed landscape is not used as an excuse to overturn the reforms of the recent McCain-Feingold Act. The prohibitions against the use of corporate and union money in federal elections must be extended to political communications transmitted over the Internet. And, finally, the FEC must clarify the circumstances under which bloggers are entitled to the media exemption.

Respectfully submitted,

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Carol Darr
Director